FILE COPY

Supreme Court, U.S.
FILED
SEP 17 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 75

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

JONATHAN TODD BYERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE RESPONDENT

JOHN W. POULOS
School of Law
University of California
Davis, California 95616
Telephone: (916) 752-2881
Attorney for Respondent

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
A. The Underlying Facts	2
B. Proceedings in the Justice Court for the Ukiah Judicial District	3
C. Proceedings in the Superior Court of the State of California for the County of Mendocino	4
D. Proceedings in the California Court of Appeal	4
E. Proceedings in the California Supreme Court	5
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. The Only Statute Here in Question Is California Vehicle Code Section 20002(a) and the Sole Purpose of that Section Is to Protect Property Owners from Financial Loss	17
II. Section 20002(a) Violates Byers' Fifth Amendment Privilege Against Self-Incrimination under the Facts of this Case	19
A. Compliance with Section 20002(a) Did Create a Substantial Hazard of Self-Incrimination for Byers under the Facts of this Case	23
B. Section 20002(a) Compels Testimonial Self-Incrimination	26
C. Compliance with Section 20002(a) Undermines the Values Upon Which the Privilege Against Self-Incrimination Rests	29
III. The California Supreme Court in its Decision Did Not Extend the *Albertson-Marchetti-Grosso-Haynes & Leary* Cases, but Applied Them to the Case at Bar	31
A. This Court is Bound by the California Supreme Court's Interpretation	33

Page

B. Even if this Court Is Not Bound by the California Supreme Court's Judgment Below Concerning California State Law, It's Decision is Persuasive, and It Is Correct 34

1. The Decision of the California Supreme Court Below Is Persuasive 34

2. The Decision of the California Supreme Court Below Is Correct 35

C. Assuming, Solely for the Purposes of This Argument, that Section 20002(a) is Directed at the "Public at Large" and Compels Answers to Questions "Neutral on Their Face", Section 20002(a) has Violated Byers' Fifth Amendment Privilege under the Facts of this Case 36

IV. The Holding of the California Supreme Court That Section 20002(a) Violates the Fifth Amendment Privilege is Entirely Consistent with This Court's Holding in *United States v. Sullivan* 37

A. Unlike *United States v. Sullivan*, 274 U.S. 259 (1927), Every Portion of section 20002(a) had the Direct and Unmistakeable Consequence of Incriminating Respondent Byers 37

B. The Case at Bar is Entirely Consistent with *United States v. Sullivan*, 274 U.S. 259 (1927) ... 39

V. The Case at Bar Does Not Come within the Purview of the "Required Records Doctrine" of *Shapiro v. United States* 41

VI. The Creation of Use Restrictions Struck an Appropriate Balance Between the Interests of the State and the Interests of Respondent Byers 43

A. This Court has Never Used a Balancing Formula to Determine Whether the Fifth Amendment Has Been Abridged in a Given Case 43

Page

B. The State Interest Involved with Section 20002 is the Protection of Property Owners Against Financial Loss and Is Not "Driver Regulation" and "Highway Safety" 45

C. The California Supreme Court Created Use Restrictions in Order to Recognize the State Interest in Protecting Private Property from Financial Loss and Protect Respondent's Fifth Amendment Privilege Against Self-Incrimination 45

VII. Regardless of the Conclusion Reached by this Court on the Constitutional Issues Tendered, the Unique Disposition of this Case by the California Supreme Court on State Grounds Requires this Court to Affirm the Judgment Below 50

CONCLUSION 51

APPENDIX 1a

TABLE OF AUTHORITIES CITED

Cases:

Albertson v. S.A.C.B., 382 U.S. 70 (1965) ..... *passim*

American Railway Express Co. v. Kentucky, 273 U.S. 269 (1927) 34

Bailey v. Superior Court, 4 Cal. App. 3d 513, 84 Cal. Rptr. 436 (1970) 17, 18, 49

Barenblatt v. United States, 360 U.S. 109 (1959) 44

Boyd v. United States, 116 U.S. 616 (1886) 29, 30

Bram v. United States, 168 U.S. 532 (1897) 29

Dennis v. United States, 341 U.S. 494 (1951) 44

Gardner v. Broderick, 392 U.S. 273 (1968) 46

General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944) 11, 34

Gilbert v. California, 388 U.S. 263 (1967) 27

Grosso v. United States, 390 U.S. 62 (1968) ..... *passim*

Page

Haynes v. United States, 390 U.S. 85 (1968) ..... *passim*

Hoffman v. United States, 341 U.S. 479 (1951) 20

Leary v. United States, 395 U.S. 6 (1969) ..... *passim*

Malloy v. Hogan, 378 U.S. 1 (1964) 7, 18, 19, 20

Marchetti v. United States, 390 U.S. 39 (1968) ..... *passim*

Miglierini v. Havemann, 240 Cal. App. 2d 570, 49 Cal. Rptr. 795 (1966) 17, 37

Minor v. United States, 396 U.S. 87 (1969) 9, 22, 40

Miranda v. Arizona, 384 U.S. 436 (1966) 23, 24, 25, 29

Murdock v. City of Memphis, 20 Wall. 590 (1875) 34

Murphy v. Waterfront Commission, 378 U.S. 52 (1964) .. 14, 29, 46

Niemotko v. Maryland, 340 U.S. 268 (1951) 44

People v. Lucus, 41 Ill. 2d 370, 243 N.E. 2d 228 (1968) 7, 19

People v. Mendoza, 251 Cal. App. 2d 835, 60 Cal. Rptr. 5 (1967) 40

People v. Scofield, 203 Cal. 703, 265 P. 914 (1928) 17

People v. Stansberry, 242 Cal. App. 2d 199, 51 Cal. Rptr. 403 (1966) 17, 37

Peoples v. United States, 365 F.2d 284 (10th Cir. 1966) 27

Pickering v. Board of Education, 391 U.S. 563 (1968) 44

Schenck v. United States, 249 U.S. 47 (1919) 44

Schmerber v. California, 384 U.S. 757 (1966) 26, 27

Scripto v. Carson, 362 U.S. 207 (1960) 34

Shapiro v. United States, 335 U.S. 1 (1948) 11, 12, 32, 41, 42

State v. Lemme, 244 A.2d 585 (Sup. Ct. of R.I., 1968) 7, 19

Swingle v. United States, 151 F.2d 512 (10th Cir. 1945) 27

Tehan v. Shott, 382 U.S. 406 (1966) 29

Terry v. Ohio, 392 U.S. 1 (1968) 25

Toussie v. United States, 397 U.S. 112 (1970) 9, 23

Ullmann v. United States, 350 U.S. 422 (1956) 29

Page

United States v. Burr, 25 Fed. Cas. 38 (No. 14,629e) (C.C. Va. 1807) 20

United States v. O'Brien, 391 U.S. 367 (1968) 44

United States v. Olson, 253 Fed. 233 (W.D. Wash. 1917) 40

United States v. Sullivan, 274 U.S. 259 (1927) ...12, 26, 37, 39, 40

United States v. Wade, 388 U.S. 218 (1967) 26, 27, 30

United States v. Walden, 411 F.2d 1109 (4th Cir. 1969) cert. den. 396 U.S. 931 (1969) 40

United States v. White, 322 U.S. 694 (1944)..... 29

Warszower v. United States, 312 U.S. 342 (1941) 40

Constitutions:

United States Constitution, Amendment Five..... 4, 43

California Codes:

California Vehicle Code

Section 16000..... 24
Section 20001..... 17, 18
Section 20002..... 2
Section 20003..... 3a
Section 20004..... 3a
Section 21750 ..... 2, 3a
Section 40000 ..... 31, 4a

Texts:

Levy, Origins of the Fifth Amendment, Oxford University Press, 1968, pp. 324, 330, 427-8, 430, 431 ..... 28, 30

McCormick, Evidence, 1954, Section 134, p. 283; Section 239 et seq., pp. 502 et seq..... 27, 28

McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, pp. 209, 210, 221 ..... 29, 41

VIII Wigmore, Evidence, McNaughton's rev., 1961
Section 2250, pp. 267-295 28
Section 2251, p. 317 29

Wright, Law of Federal Courts, 2d Ed. 1970
Section 107, p. 488 34

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 75

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

JONATHAN TODD BYERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Does California Vehicle Code Section 20002(a), which requires a driver involved in an automobile accident resulting in property damage to stop at the scene and identify himself as the driver, when the accident giving rise to the statutory obligation was caused by criminal conduct of the driver, violate the driver's privilege against self-

incrimination secured to him by the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Assuming that the answer to the preceding question is in the affirmative, whether restrictions may be imposed upon the use of the information required to be divulged by California Vehicle Code Section 20002(a) so as to ultimately sustain the constitutionality of that statute.

STATEMENT OF THE CASE

A. THE UNDERLYING FACTS[1]

On August 20, 1966 Respondent Byers was driving a car and while in the process of overtaking another vehicle proceeding in the same direction, he failed to pass to the left at a safe distance as required by section 21750 of the California Vehicle Code.[2] (A. 48-49) As a result of his failure to pass to the left at a safe distance, there was a collision between the vehicle driven by Respondent Byers and the vehicle being overtaken which caused property damage. (A. 48-49) Byers did not stop at the scene of the accident and comply with California Vehicle Code Section 20002(a).[3] (A. 48-49)

---

[1]The following statement is based upon the inferences reasonably drawn from the record below. Since a demurrer to the complaint was interposed below for the purpose of this action, the facts alleged in the criminal complaint may be taken to be true.

[2]Section 21750 provides: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated."

[3]At the time of the accident, section 20002, subdivision (a) provided: "The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle

B. PROCEEDINGS IN THE JUSTICE COURT FOR THE UKIAH JUDICIAL DISTRICT.

Two days later, on August 22, 1966, a two-count criminal complaint was filed in the Justice Court for the Ukiah Judicial District, Mendocino County, California, charging the respondent Jonathan Todd Byers with two misdemeanor violations of the California Vehicle Code. Count one of the complaint charged Byers with improper and unsafe driving in violation of section 21750 of the California Vehicle Code. Count two charged that he violated section 20002(a) of the California Vehicle Code (failure to stop at the scene of an accident resulting in property damage) (A. 7, 12-13).

Byers filed a demurrer to Count two of the complaint (A. 14-17). He claimed, *inter alia*, that section 20002(a) was unconstitutional on its face and as applied to him because it violated the privilege against self-incrimination guaranteed by both the federal and state constitutions. (A. 8, 14-17). It was stipulated by counsel that both charges contained in the complaint arose from the same accident (A. 8-9). On December 7, 1966, the Justice Court overruled the demurrer (A. 8-9).

---

involved, or; (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both."

In 1967 this section was amended in several minor respects not pertinent to this case.

C. PROCEEDINGS IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF MENDOCINO

On January 13, 1967, Byers filed a petition for writ of prohibition in the Mendocino County Superior Court (A. 7-25). In the Superior Court Byers again urged that the privilege against self-incrimination barred his prosecution under Count two. He contended that compliance with the "hit-run" provisions of California Vehicle Code Section 20002(a) violated the privilege against self-incrimination when he was also charged with another criminal offense arising from the same accident (A. 9). On February 17, 1967, the Superior Court issued an opinion granting the writ of prohibition sought by Byers (A. 36-45). The Court held that section 20002(a) could not be applied against Byers without violating the privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States.

In the granting of the writ of prohibition in the California Superior Court, the Court, in its findings of fact, found as follows:

> "The alleged violation of Vehicle Code Section 21750 as alleged in Count I of said complaint resulted in an impact between the vehicle driven by the Petitioner and another vehicle which caused property damage and that the damage from this impact was the resulting injury to property alleged in Count II of said complaint." (A. 49)

Accordingly, on March 21, 1967, the Court issued a Permanent Writ of Prohibition to restrain further proceedings in the Justice Court on Count two of the Complaint (A. 3, 54-55).

D. PROCEEDINGS IN THE CALIFORNIA COURT OF APPEAL

On March 2, 1967 a notice of appeal was filed in the California Court of Appeal (A. 57). The Court of Appeal reversed the decision of the Superior Court and held that enforcement of the "hit-run" statute against Byers was not

barred.[4] However, in reaching that decision, the Court of Appeal held that the Fifth Amendment privilege against self-incrimination was infringed by a requirement that a driver involved in an accident must stop and identify himself in any case where he was later charged with a criminal offense arising from the accident. The rationale of the Appellate Court's decision was that compliance with section 20002(a) would require Byers to admit that he was the driver who passed unsafely in violation of section 21750. Nevertheless, the Court of Appeal also held that compliance with section 20002(a) could be constitutionally justified if admissions made in compliance with the statute were not later used in evidence. Accordingly, by adoption of the theory of restriction of use, the Court upheld enforcement of the statute.

E. PROCEEDINGS IN THE CALIFORNIA SUPREME COURT.

Both the People of the State of California and the respondent Byers filed a Petition for Hearing in the California Supreme Court. On November 20, 1968 the Court granted a hearing on the matter. Following the briefing and argument, the California Supreme Court on September 16, 1969 issued its opinion affirming the judgment granting the permanent writ of prohibition entered by the Superior Court in Mendocino County (A. 58-84).

In reaching that decision, the California Supreme Court concluded that the Fifth Amendment privilege against self-incrimination was applicable to the requirements of section 20002(a). The Court stated that:

> "We are satisfied that the privilege is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes

---

[4]That opinion which is not reported in the permanent volumes of the Official California reports is nevertheless set forth at 265 A.C.A. 1031, 71 Cal. Rptr. 609 (1968).

that compliance with the stature will result in self-incrimination" (A. 66);

The Court also held that compliance with section 20002(a) could be sustained if no use were made of the required information or its fruits in connection with any criminal proceeding. The Court stated that:

> ". . . we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident." (A. 79)

Since judicially-created restrictions on use were a "doctrine new to California's jurisprudence" (A. 80), being created by the Supreme Court's decision in this very case for this first time, the California Supreme Court affirmed the judgment of the trial court below, saying:

> "We conclude . . . that it would be unfair to hold that although Byers correctly asserted that the Fifth Amendment privilege was applicable to the question of his compliance with the "hit-and-run" statute he should have complied because of use-restrictions which he could only have speculated might exist." (A. 81-82)

SUMMARY OF ARGUMENT

I

The only statute here in question is California Vehicle Code Section 20002(a) and the sole purpose of that section is to protect property owners from financial loss by requiring drivers involved in accidents resulting in property damage to disclose the name and address of the driver and

owner of the offending vehicle (A. 68). Thus, the only state interest involved with section 20002(a) is that of helping citizens to avoid financial loss as a result of property being damaged by some unknown person. Section 20002(a) does not seek to promote "highway safety" or protect persons injured in automobile accidents.

Two non-California post-*Malloy v. Hogan*, 378 U.S. 1 (1964), cases are cited by the Attorney General of California, *State v. Lemme*, 244 A.2d 585 (Supreme Court of R.I. - 1968), and *People v. Lucus*, 41 Ill. 2d 370, 243 N.E. 2d 228 (1968), as upholding the Rhode Island and Illinois "hit-and-run" statutes there in question against the contention that they violated the Fifth Amendment privilege against self-incrimination. Both cases are factually distinguishable from the case at bar. In neither case was the defendant either charged with or convicted of any other offense in connection with the accident which gave rise to his statutory duty to identify himself as the driver of the vehicle involved. In the case at bar, a violation of California Vehicle Code Section 21750 (failure to pass to the left at a safe distance) by Byers caused the accident which invoked the requirements of section 20002(a) which compelled Byers, on pain of penal sanction, to stop and give the name and address of the driver and owner of the vehicle that he was driving.

II

The Fifth Amendment privilege against self-incrimination provides a person with protection against state as well as federal governmental action, (*Malloy v. Hogan*, 378 U.S. 1 (1964)) whether the governmental action takes the form of questioning by public officials investigating alleged criminal activity (*Malloy v. Hogan, supra*), or a statute which requires the disclosure of self-incriminating information. *Leary v. United States*, 395 U.S. 6, 28 (1969); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Albertson v. S.A.C.B.*, 382 U.S. 70 (1965).

On August 20, 1966 Byers was driving a car and while in the process of overtaking another vehicle proceeding in the same direction, he failed to pass to the left at a safe distance as required by section 21750 of the California Vehicle Code (A. 48-49). As a result of his failure to pass to the left at a safe distance, (the violation of section 21750), there was a collision between the vehicle driven by Respondent Byers and the vehicle being overtaken. The impact caused property damage (A. 48-49). Byers did not stop at the scene of the accident and comply with California Vehicle Code Section 20002(a) (A. 48-49). Two days later, on August 22, 1966, a two count criminal complaint was filed against Byers charging him with a violation of section 21750 and 20002(a) of the California Vehicle Code.

Section 20002(a), as construed by the California Supreme Court below, requires the driver of an automobile involved in an accident resulting in property damage to stop at the scene of the accident and give the name and address of the driver and owner of the vehicle involved to the owner or person in charge of the damaged property (A. 58, 59, 63, 64).

Section 20002(a) would thus compel Byers, as the driver of an automobile involved in an accident resulting in property damage, to stop at the scene of the accident which was *caused* by his alleged violation of section 21750 and give the name and address of the driver of the car. Since section 21750 requires "*the driver*" to pass to the left at a safe distance and since section 20002(a) required Byers, as the driver to stop at the scene and give the driver's name and address (*his* name and address) section 20002(a) required Byers to stop at the scene and communicate information which would actually prove one of the elements of the offense defined by section 21750. Since section 21750 requires the driver to pass to the left at a safe distance, the identity of the driver is crucial in every prosecution under that section and forms one of the elements of the crime.

Upon Byers' failure to pass to the left at a safe distance thus causing the accident resulting in property damage, Byers was faced with the choice of self-incrimination by complying with section 20002(a) or failing to comply with 20002(a) thereby avoiding incriminating himself under section 21750 but committing the crime defined by section 20002(a) by failing to provide the required information. California has thus presented Byers with the proverbial choice between "the rock and the whirlpool" - either incriminate himself (under section 21750) or commit a crime for failing to do so (a violation of section 20002(a)). Under this Court's decisions in *Leary v. United States, supra,* 395 U.S. 6 (1969); *Marchetti v. United States, supra,* 390 U.S. 39 (1968); *Grosso v. United States, supra,* 390 U.S. 62 (1968); *Haynes v. United States, supra,* 390 U.S. 85 (1968); and *Albertson v. SACB, supra,* 382 U.S. 70 (1965), California may not so abridge Byers' Fifth Amendment privilege against self-incrimination. The dilemma which confronted Byers–either incriminate himself under section 21750 or commit the crime defined by section 20002(a) for failing to do so is precisely what the Fifth Amendment prohibits under the Court's holdings in *Leary, Marchetti, Grosso, Haynes* and *Albertson. Minor v. United States,* 396 U.S. 87, 92-93 (1969); *Toussie v. United States,* 397 U.S. 112, 133-134 (1970) (Dissenting Opinion of Mr. Justice White - dictum). Accordingly, the California Supreme Court quite correctly relied upon *Marchetti, Grosso* and *Haynes* and held that the privilege against self-incrimination is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop, and divulge the name and address of the driver of the automobile, which is, of course, his name and address, and reasonably believes that compliance with the statute will result in self-incrimination (A. 66).

The argument that compliance with section 20002(a) did not constitute a substantial hazard of self-incrimination is not well taken. It is difficult to imagine a case where the hazard of self-incrimination is more real and apparent than

in the case at bar where criminal conduct on the part of Byers (the violation of section 21750) *caused* section 20002(a) (the "hit-and-run" property damage statute) to be applicable and where compliance with section 20002(a) would have required Byers to communicate to a third person the fact that he was the driver of the offending vehicle, one of the facts that the prosecution must prove to establish his guilt under section 21750. The substantiality of the hazard of self-incrimination to Byers is further reflected by the fact that the accident happened on August 20, 1966 and the criminal complaint charging violation of both sections 21750 and 20002(a) was filed only two days later on August 22, 1966 (A. 12-13, 48-49).

Likewise, the argument that section 20002(a) requires non-testimonial information is specious. Section 20002(a) requires either a written or verbal communication by the driver of the automobile giving the name and address of the driver and owner of the automobile in question. Section 20002(a) thus does not merely require a citizen to stop and identify himself, but it requires him to stop and communicate the name and address of the driver and owner of the vehicle in question. Under the facts of the case at bar, compelling such information from Byers would have resulted in his incriminating himself under section 21750.

III

The California Supreme Court in its decision below did not extend the *Albertson - Marchetti - Grosso - Haynes & Leary* cases, but correctly applied those decisions to the case at bar.

The law pertaining to the driving of motor vehicles upon the highways of California is an area "permeated with criminal statutes." Indeed the area of driving an automobile in California is more "permeated" with criminal statutes than was the area covered by Sections 5841 and 5851 of the National Firearms Act and yet this Court held in *Haynes*, that it was an "area permeated with criminal sta-

tutes." *Haynes v. United States,* 390 U.S. 85, 97 ftn. 11, p. 99 (1968). Comparing the statutes on firearms which this Court faced in *Haynes* with the vastly greater numbers of statutes dealing with the driving of motor vehicles, the conclusion is compelled that this is, indeed, "an area permeated with criminal statutes."

Likewise, the argument that section 20002(a) is not directed at persons "inherently suspect of crime" is not well taken. The California Supreme Court in its decision below held,

> ". . . although not all drivers involved in accidents are lawbreakers, there is a substantial correlation between being a driver involved in an accident and being a driver who has contemporaneously violated one or more vehicle laws . . . (A. 64)
>
> Although the group subject to "hit-and-run" statutes "*i.e.,* section 20002(a)], drivers involved in accidents, is not inherently suspect of criminal activities to the same extent as the groups regulated by the statutes in *Marchetti, Grosso,* and *Haynes,* there is in the accident cases, unlike the situation in *Shapiro,* a substantial shadow of suspicion cast upon the persons regulated by the statute." . . . (A. 64)

Thus the California Supreme Court has held that section 20002(a) is aimed at a "suspect group" inherently suspect of criminal activity (A. 64).

The above holding may be considered to be conclusive for the California Supreme Court is the final arbiter of its local laws and the facts on which the Court founded its judgment are controlling. *General Trading Co. v. State Tax Comm'n.,* 322 U.S. 335, 337 (1944). The conclusion of the California Supreme Court construing section 20002(a) and its relationship with other California penal statutes and its conclusion concerning the effects of the statute in California fall within the concept of "state law" and are therefore conclusive here. Even if these holdings are not considered conclusive, the decision of the California Supreme Court is both persuasive and correct.

IV

United States v. Sullivan, 274 U.S. 259 (1927) is not applicable to the case at bar for the same reasons that it was inapplicable to *Albertson, Marchetti, Grosso, Haynes* and *Leary*.

The case at bar is completely distinguishable from *Sullivan* in that "every portion" (*albeit*, section 20002(a) has essentially only *one* "portion") of section 20002 is self-incriminating whereas most, if not all, of the Federal Income Tax law is not self-incriminating. In this regard section 20002 is like the federal wagering tax act involved in *Marchetti* and *Grosso*, and is unlike the federal income tax provisions upheld in *Sullivan*.

Not only is the case at bar distinguishable from *Sullivan*, but it is also consistent with the suggestion made by this Court in *Sullivan* that if the Federal income tax return required self-incrimination, that the privilege could be claimed in the return to the specific self-incriminating disclosure required by the return. *United States v. Sullivan, supra*, 274 U.S. 259, 263 (1927). Since not every portion of the federal income tax return compelled self-incrimination, Sullivan was not privileged to fail to make a return. *United States v. Sullivan, supra* at 263-264. Just as Sullivan would have been privileged to fail to answer specific incriminating questions contained in the return, so Byers was privileged not to incriminate himself when required to do so. The crucial difference here between *Sullivan* and the case at bar is that not all of the information required from Sullivan was self-incriminating whereas all of the information compelled from Byers was self-incriminating.

V

For exactly the same reasons discussed by this Court in *Marchetti v. United States*, 390 U.S. 39, 57 (1968), the case at bar does not come within the purview of the "required records doctrine" of *Shapiro v. United States*, 335 U.S. 1 (1948).

VI

The Attorney General of California suggests that a balancing formula be used by this Court in order to determine whether the Fifth Amendment has been abridged in this case. No case is cited by the Attorney General of California which indicates that this Court has ever been willing to approach the Fifth Amendment privilege against self-incrimination in this manner. No weighing or balancing test has ever been used in applying the Fifth Amendment by this Court in any case that we could find. Once it is found that the privilege against self-incrimination does apply, the prohibition against violation of the privilege by compelling self-incrimination is absolute. It is precisely in the area where the state's interest is a full disclosure is the most compelling, that the Fifth Amendment privilege against self-incrimination has its most vital meaning. Thus, a balancing formula can have no application to cases involving the Fifth Amendment privilege, if that privilege is to continue as a meaningful right of all Americans.

The California Supreme Court held that section 20002(a), without more, violated Respondent Byers' Fifth Amendment privilege against self-incrimination under the facts of this case (A. 66), but in order to make the information available for the protection of private property, the California Supreme Court judicially created use restrictions (A. 70).

Having first found that, without more, section 20002(a) abridged Byers' Fifth Amendment privilege against self-incrimination, the California Supreme Court could only hold either that the Fifth Amendment constituted a complete defense or create restrictions on the use of the information sufficient to protect Respondent Byers' privilege against self-incrimination. As a matter of Federal Constitutional law, no other choice was available to the California Supreme Court once the conclusion was reached that section 20002(a) abridged Byers' Fifth Amendment privilege.

See, e.g., Murphy v. Waterfront Commission, supra, 378 U.S. 52, 79 (1964); *Albertson v. SACB, supra,* 382 U.S. 70, 79-81 (1965); *Marchetti v. United States, supra,* 390 U.S. 39, 60 (1968).

The constitutional inquiry begins with the determination that the statute in question abridges the Fifth Amendment privilege against self-incrimination and ends with an assessment of the use restrictions imposed for the purposes of determining whether they are adequate to afford "complete protection from all the perils against which the constitutional prohibition was designed to guard." *Albertson v. SACB, supra,* 382 U.S. 70, 80 (1965).

Since the use restrictions imposed by the California Supreme Court preclude prosecuting authorities from using information divulged in compliance with section 20002 together with the "fruits" of such information, we concede that the use restrictions adequately protect Respondent Byers' Fifth Amendment privilege against self-incrimination. The touchstone of validity of use restrictions is the Respondent Byers' Fifth Amendment privilege, and since he concedes it to be adequately protected by the use restrictions judicially created by the California Supreme Court below, this should end the inquiry.

The Attorney General of California argues that the use restrictions imposed by the California Supreme Court below make the state's ability to enforce its criminal laws difficult, if not impossible (Brief for the Petitioner, p. 25).

Once it is concluded that a statute violates a citizen's Fifth Amendment privilege, the particular court must find either that the Fifth Amendment constitutes a complete defense to a prosecution under the statute for failure to divulge the required information or create use restrictions adequate to protect the citizen's Fifth Amendment privilege. The only Federal Constitutional aspects of the problem are the initial determinations as to whether the use restrictions if any have been created, are adequate to protect the Fifth Amendment privilege.

The decision to impose use restrictions rather than to hold the Fifth Amendment to be a complete defense, once the Court has found that the statute violates the Fifth Amendment privilege, is a matter of *state law* and not federal constitutional law.

The decision as to which of these two constitutionally adequate alternatives would be used in this case was a matter of the law of the State of California and is not reviewable by this Court. The determination of this issue revolves around the intent of the California Legislature in enacting section 20002 (A. 75-76) and assessing the impact of use restrictions in California upon criminal prosecution of drivers involved in accidents resulting in damage to the property of others (A. 75), both of which are issues in which the Supreme Court of California is the final arbiter.

The California Supreme Court held that use restrictions would not unduly hamper criminal prosecutions in California (A. 75) and that the creation of use restrictions comported with the probable legislative intent of the California Legislature (A. 77).

The Brief for the Petitioner, insofar as it argues that the creation of the use restrictions "made the state's ability to enforce its criminal laws difficult, if not impossible" (Brief for the Petitioner, pp. 24-25) presents no constitutional argument to this Court.

VII

The case before the California Supreme Court below was an appeal by the People from a judgment granting Respondent Byers' petition for a writ of prohibition which judgment prohibited the state from prosecuting Byers under California Vehicle Code Section 20002(a) upon the theory that section 20002(a) violated Byers' Fifth Amendment privilege against self-incrimination. (A. 57, 59, 79-80)

The California Supreme Court held (1) that without consideration of the imposition of use restrictions, section 20002(a) did violate Respondent Byers' Fifth Amendment privilege, but (2) since the California Supreme Court, for the first time in the judicial history of California, judicially created use restrictions which adequately protected Respondent Byers' Fifth Amendment privilege, that Respondent Byers was required to comply with the provision of section 20002(a). (A. 79-81)

A Court more taken with classical theory than with the realities of the world would have reversed the judgment, for classical theory would have found that although the use restrictions were judicially created for the first time in this very appeal, the Court merely "discovered" existing law that existed at the time Byers refused to comply with section 20002 and therefore he was incorrect and could have been punished for his failure to comply.

The California Supreme Court, recognizing that ". . . we here announce a doctrine new to this state's jurisprudence . . ." (A. 80) *affirmed* the judgment saying ". . . it would be unfair to hold that although Byers correctly asserted that the Fifth Amendment privilege was applicable to the question of his compliance with the "hit-and-run" statute he should have complied because of use-restrictions which he could only have speculated might exist." (A. 81-82)

If this Court holds that the California Supreme Court is incorrect in its holding that section 20002(a) violates Respondent Byers' Fifth Amendment privilege, *a fortiori* Byers cannot, with "fairness" be punished for having "correctly asserted", according to all of the justices of the state Supreme Court, that the Fifth Amendment privilege was applicable. Since all of the justices of the state's highest court agreed with Byers that the Fifth Amendment privilege was applicable to the question of his compliance with section 20002, at most he is guilty of bad constitutional jurisprudence, but not of crime. Fairness demands no less than affirmance.

ARGUMENT

I. THE ONLY STATUTE HERE IN QUESTION IS CALIFORNIA VEHICLE CODE SECTION 20002(a) AND THE SOLE PURPOSE OF THAT SECTION IS TO PROTECT PROPERTY OWNERS FROM FINANCIAL LOSS.

The only statute here in question is California Vehicle Code Section 20002(a). The sole purpose of section 20002 is to protect property owners from financial loss by requiring drivers involved in accidents resulting in property damage to disclose the name and address of the driver and owner of the offending vehicle (A. 68). See also: *People v. Stansberry*, 242 Cal. App. 2d. 199, 203, 51 Cal. Rptr. 403 (1966); *Miglierini v. Havemann*, 240 Cal. App. 2d 570, 573, 49 Cal. Rptr. 795 (1966). Section 20002, the California "hit-and-run property damage" statute, must be contrasted with California Vehicle Code Section 20001,[5] the California "hit-and-run personal injury" statute. The crucial distinction between the two statutes is that the "hit-and-run personal injury" statute additionally requires the driver to stop and render reasonable assistance to any person injured in the accident. The legislative purpose in enacting section 20001 was to prevent the driver of the offending car from leaving the scene of the accident without furnishing the information as to the identity of the driver and owner of the offending vehicle and without rendering necessary aid to the injured person. *Bailey v. Superior Court*, 4 Cal. App. 3d 513, 519, 84 Cal. Rptr. 436 (1970); *People v. Scofield*, 203 Cal. 703, 707-708, 265 P. 914 (1928).

The Attorney General of California fails to recognize the distinction between sections 20002 and 20001 and simply refers to "hit-and-run" statutes in the first portion of the argument (see Brief for the Petitioner 10-13).

---

[5]The text of section 20001 and supporting sections is set forth in the appendix to this brief.

Since the decision in this case by the California Supreme Court, the California Court of Appeal has held that insofar as section 20001 requires the furnishing of information it is similar in its requirement and in its purpose to section 20002(a), and that the rules set forth in *Byers v. Superior Court* (the California Supreme Court opinion below) are controlling, but that the portion of section 20001 which requires the driver of a vehicle to stop and render assistance is severable for purposes of determining the applicability of the privilege against self-incrimination. They further held that since the rendering of assistance does not compel incriminating disclosures, the Fifth Amendment has no application to that portion of section 20001 which requires the driver to stop at the scene of the accident involving personal injuries and render assistance to the injured person. *Bailey v. Superior Court*, 4 Cal. App. 3d 513, 519-523, 84 Cal. Rptr. 436 (1970).

As of this date, in California, all drivers involved in accidents must stop at the scene and comply with the requirements of the appropriate "hit-and-run" statute. With respect to the compelled information which is self-incriminating, the restrictions on use created by the California Supreme Court in its opinion below, preclude the use of the compelled information or its fruits in subsequent prosecutions by the prosecuting authorities. If the accident involves personal injuries, the adverse driver must render assistance to the injured person. The decision below has ultimately resulted in an accommodation between the privilege against self-incrimination and the interests of the State of California in protecting persons and property against harm and loss. In reaching this accommodation, the California Supreme Court correctly applied the Fifth Amendment privilege to the facts of the case at bar.

The various pre-*Malloy v. Hogan*, 378 U.S. 1 (1964) state court decisions upholding various "hit-and-run" statutes against attack upon the basis of state law cited by the Attorney General of California (Brief for the Petitioner, 11-

12) do not involve the Fifth Amendment privilege against self-incrimination and are therefore not pertinent here.

The two post *Malloy* cases, *State v. Lemme*, 244 A.2d 585 (Supreme Court of R.I. - 1968) and *People v. Lucus*, 41 Ill. 2d 370, 243 N.E. 2d 228 (1968), are both factually distinguishable from the case at bar. In neither *Lemme* nor *Lucus* was the appellant either charged with or convicted of any other offense in connection with the accident which gave rise to his statutory duty to identify himself. Indeed, in *Lemme* the facts appear to indicate that the appellant could not show a fear of self-incrimination under some other Rhode Island statute (244 A.2d 585, 590) and in *Lucus* there is no indication that any such charge would have been warranted (243 N.E. 2d 228, 231). It is not therefore surprising that the courts in those two cases concluded that there was no real or substantial danger that the compelled information would be self-incriminating.

II. SECTION 20002(a) VIOLATES BYERS' FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FACTS OF THIS CASE.

The Fifth Amendment privilege against self-incrimination provides a person with protection against state as well as federal governmental action, (*Malloy v. Hogan*, 378 U.S. 1 (1964)) whether the governmental action takes the form of questioning by public officials investigating alleged criminal activity (*Malloy v. Hogan, supra*, 378 U.S. 1 (1964)) or a statute which requires the disclosure of self-incriminating information. *Leary v. United States*, 395 U.S. 6, 28 (1969); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Albertson v. SACB*, 382 U.S. 70 (1965).

If the statute compels the person to incriminate himself, the Fifth Amendment provides a complete defense to a prosecution, under the statute, for failure to comply with its terms. *Leary v. United States, supra*, 395 U.S. 6, 28, 29

(1969); *Marchetti v. United States, supra,* 390 U.S. 39, 60 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 100 (1968).

The statute which compels the information must, of course, compel a "self-incriminating" communication, but the information required need not, without more, support a criminal conviction for it is sufficient if the information compelled by the statute would furnish a link in the chain of evidence needed to prosecute. *United States v. Burr,* 25 Fed. Cas. 38, 40 (No. 14,629e) (C.C. Va. 1807); *Hoffman v. United States,* 341 U.S. 479, 486-7 (1951); *Malloy v. Hogan, supra,* 378 U.S. 1, 11-12 (1964); *Albertson v. SACB, supra,* 382 U.S. 70, 78 (1965); *Marchetti v. United States, supra,* 390 U.S. 39, 48; *Leary v. United States, supra,* 395 U.S. 6, 16 (1969).

Also, though the information compelled by the statute might appear to involve self-incrimination in the abstract, the person must, in fact, be confronted by a "substantial and real," and not a mere "trifling or imaginary," hazard of incrimination. *Leary v. United States, supra,* 395 U.S. 6, 16 (1969); *Marchetti v. United States, supra,* 390 U.S. 39, 53 (1968); *Grosso v. United States, supra,* 390 U.S. 62, 66 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 97 (1968).

Under the circumstances of this case, California Vehicle Code Section 20002(a) compels respondent Byers to give information which would incriminate himself and the danger of self-incrimination is real and substantial and not merely trifling or imaginary.

On August 20, 1966 Respondent Byers was driving a car and while in the process of overtaking another vehicle proceeding in the same direction, he failed to pass to the left at a safe distance as required by section 21750 of the California Vehicle Code (A. 48-49). As a result of his failure to pass to the left at a safe distance, there was a collision between the vehicle driven by Respondent Byers and the vehicle being overtaken. The impact caused property dam-

age. (A. 48-49) Byers did not stop at the scene of the accident and comply with the California Vehicle Code Section 20002(a) (A. 48-49).

On August 22, 1966, a two count criminal complaint was filed in the Justice Court for the Ukiah Judicial District, County of Mendocino, State of California charging Respondent Byers in Count I with a violation of Section 21750 of the California Vehicle Code (failure to pass to the left at a safe distance) and in Count II with a violation of Section 20002(a) of the California Vehicle Code (the California hit-run property damage section) (A. 12-13, 48-49).

By demurrer, filed in the Justice Court, an appropriate California procedure to that end, Respondent Byers challenged the constitutionality of section 20002(a) as applied to him under the circumstances of this case upon the ground that section 20002(a) violated his federally protected Fifth Amendment privilege against self-incrimination (A. 14-15, 50).

Section 20002(a), as construed by the California Supreme Court below, requires the driver of an automobile involved in an accident resulting in property damage to stop at the scene of the accident and give the name and address of the driver and owner of the vehicle involved to the owner or person in charge of the damaged property (A. 58, 59, 63, 64).

Section 20002(a) would thus compel Byers, as the driver of an automobile involved in an accident resulting in property damage, to stop at the scene of the accident which was *caused* by his alleged violation of section 21750 and give the name and address of the driver of the car. Since section 21750 requires *"the driver"* to pass to the left at a safe distance and since section 20002(a) required Byers, as the driver to stop at the scene and give the driver's name and address (*his* name and address) section 20002(a) required Byers to stop at the scene and communicate information which would actually prove one of the elements of the offense defined by section 21750. Since section 21750 re-

quires the driver to pass to the left at a safe distance, the identity of the driver is crucial in every prosecution under that section and forms one of the elements of the crime.

Since section 20002(a) compelled Byers to *communicate* his name and address as being the driver who failed to pass to the left at a safe distance, section 20002(a) required Byers to incriminate himself under section 21750, for the required information was of a "testimonial" nature.[6] The hazard of self-incrimination was real and substantial and not merely trifling or imaginary because it was Byers' failure to pass to the left at a safe distance (the alleged violation of section 21750) that caused the provision of section 20002(a) to become applicable. Upon Byers' failure to pass to the left at a safe distance thus causing the accident resulting in property damage, Byers was faced with the choice of self-incrimination by complying with section 20002(a) or failing to comply with 20002(a) thereby avoiding incriminating himself under section 21750 but committing the crime defined by section 20002(a) by failing to provide the required information. California has thus presented Byers with the proverbial choice between "the rock and the whirlpool" - either incriminate himself (under section 21750) or commit a crime for failing to do so (a violation of section 20002(a)). Under this Court's decisions in *Leary v. United States, supra,* 395 U.S. 6 (1969); *Marchetti v. United States, supra,* 390 U.S. 39 (1968); *Grosso v. United States, supra,* 390 U.S. 62 (1968); *Haynes v. United States, supra,* 390 U.S. 85 (1968); and *Albertson v. SACB, supra,* 382 U.S. 70 (1965), California may not so abridge Byers' Fifth Amendment privilege against self-incrimination. The dilemma which confronted Byers–either incriminate himself under section 21750 or commit the crime defined by section 20002(a) for failing to do so is precisely what the Fifth Amendment prohibits under the Court's holdings in *Leary, Marchetti, Grosso, Haynes* and *Albertson. Minor v. United*

---

[6]This requirement is discussed more fully below in this brief at pp. 26-28, *infra.*

States, 396 U.S. 87, 92-93 (1969); *Toussie v. United States*, 397 U.S. 112, 133-134 (1970) (Dissenting Opinion of Mr. Justice White - dictum). Accordingly, the California Supreme Court quite correctly relied upon *Marchetti*, *Grosso* and *Haynes* and held that the privilege against self-incrimination is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge the name and address of the driver of the automobile, which is, of course, his name and address, and reasonably believes that compliance with the statute will result in self-incrimination (A. 66).

A. Compliance with Section 20002(a) Did Create a Substantial Hazard of Self-Incrimination for Byers under the Facts of this Case.

We have shown above that the communication sought to be compelled from Byers by section 20002(a) was self-incriminating. In section II.A of California's Brief (Brief for the Petitioner, § II.A., 14-17), it is argued, in substance, that the hazard of self-incrimination placed upon Byers by section 20002(a) was "trifling" or "imaginary." It is difficult to imagine a case in which the hazard of self-incrimination to Byers was more immediate and substantial.

The Attorney General of California argues, in effect, that since section 20002(a) does not require Byers to communicate the required information to an official of the State of California, that the hazards of self-incrimination are not substantial and real. The reasoning appears to be that if the officials learn of the accident, *Miranda v. Arizona*, 384 U.S. 436 (1966) "fully serves to protect against self-incrimination" (Brief for the Petitioner, 15).

While it is true that *Miranda* fully serves to protect Byers against self-incrimination after the "custodial" (384 U.S. 436, 478) stage has been reached, the effect of *Miranda* in this case is simply to prevent *further* self-incrimination–self-incrimination in addition to the incriminating information already compelled from the mouth of Byers by section 20002(a).

Unless the privilege against self-incrimination or the use restrictions are upheld, section 20002(a) effectively requires Byers, as a driver, to be a witness against himself by extracting from him an admission as to the name and address of the driver of the offending vehicle. By compelling this admission, section 20002(a) requires Byers to create admissible evidence for the prosecution by way of an admission of a party opponent. The person to whom the compelled information must be communicated has been made into a prosecution witness, who may be subpoenaed at the trial and compelled to testify to the admission previously made by Byers pursuant to the compulsion of section 20002(a). *Miranda* thus applies to a different point in time and at a different stage in the proceedings and has no application to the case at bar.

The Attorney General of California additionally suggests that Byers did not face a real and substantial risk of incrimination because "in many cases compliance with section 20002(a) may be achieved without any knowledge or involvement by the state." (Brief for the Petitioner, 15) While it is true that this might possibly occur, the fact that an accident does occur almost inevitably results in the police being called to the scene by the owner or person in charge of the damaged property (the identical person who must be notified under the provision of section 20002(a)). Indeed, if the damage to the property exceeds the sum of $200, involved drivers are under a statutory duty in California to report the accident to the California State Department of Motor Vehicles. (California Vehicle Code Section 16000, *et. seq.*; A. 76)

If the property is unattended, the driver of the vehicle must make the incriminating statements directly to the officials of the State of California (section 20002(a)(2)). Thus it is only when attended property is damaged, and the damage is less than $200 and the person in attendance of the property does not voluntarily notify the authorities, that a compliance with section 20002(a) may be achieved

without any knowledge or involvement by the State. These contingencies are so rarely all met that in the great bulk of accidents the authorities are notified. This is generally so also by the fact the property most frequently damaged is another vehicle and the owner or person in charge of the vehicle is most anxious to have the authorities determine that it is not his fault for purposes of adjusting the inevitable insurance claims.

Even if there is a substantial number of cases in which the authorities are never notified of the accident, the likelihood of official detection of crime does not govern the validity of a claim of privilege under the Fifth Amendment. No authority is cited in support of this suggestion. Indeed, by compliance with section 20002(a) the likelihood of detection and prosecution has been greatly increased, for there is now another person who "knows" of the criminal conduct which knowledge is compelled out of the mouth of the "criminal." If this Court holds that a state statute may compel incrimination as long as the compelled incrimination is to a private party, the Fifth Amendment is in danger of complete erosion through ingeniously drawn legislation.

The suggestion that the decision below has extended *Miranda* (Brief for the Petitioner, 15) is simply without foundation in logic or authority. *Miranda* requires the authorities to advise the accused of his Fifth Amendment right to remain silent unless he chooses to speak in unfettered exercise of his own free will only when the "custodial" stage has been reached. The case at bar does not extend *Miranda*, but rather deals exclusively with the statutory abridgment of the Fifth Amendment privilege. The cases operate in completely different orbits. Certainly this case has no more to do with *Miranda*, than do *Leary*, *Marchetti*, *Grosso*, and *Haynes*.

Likewise, the suggestion that the opinion below is "inconsistent" with *Terry v. Ohio*, 392 U.S. 1 (1968) is not well taken (Brief for the Petitioner, 16). *Terry* has nothing

to do with the ability of a state to abridge the Fifth Amendment privilege by statute. If Byers had been stopped at the scene of the accident by a policeman, he might validly be asked his *identity*, but he could not be constitutionally compelled by the policeman to give the name and address of the driver of the offending vehicle. His claim of privilege against self-incrimination could be properly invoked if the policeman, at the scene, had asked Byers who the driver of the car was. While it is true that a person has no constitutional right to anonymity, the California statute in question (section 20002(a)) does not merely require Byers to *identify* himself, but section 20002(a) required Byers, as the driver, to give the *name and address of the driver* of the offending vehicle.

United States v. Sullivan 274 U.S. 259 (1927) is discussed further on in this brief.

B. Section 20002(a) Compels Testimonial Self-Incrimination.

The Attorney General of California retreats from the concession made before the California Court of Appeal. In that Court it was admitted that:

> "While identifying oneself at the scene of an accident is, of course, 'testimonial' in nature since it requires that one's voice be used as more than a 'mere identifying physical characteristic' (albeit 'not to speak his guilt,') *United States v. Wade, supra,* as the Supreme Court also indicated in the *Schmerber* decision, this kind of distinction is but one useful tool for analysis in defining the scope of the privilege, and not intended to be the sole test." *Appellant's* (The People of the State of California) *Opening Brief* before the Court of Appeal of the State of California, First Appellate District, Division Three at p. 16, lines 7-15.

It is now argued that section 20002(a) requires only a "non-testimonial" disclosure (Brief for Petitioner, 17-18), albeit with no case cited to support the contention that in-

criminating evidence compelled from the mouth of the accused is "non-testimonial" in nature.

The cases cited[7] do not deal with compelled communications, but rather with instances in which the suspect or accused was compelled to be the source of "real" or "physical" evidence. Unlike compelling a person to be the source of "real" or "physical" evidence, section 20002(a) requires the driver to "Locate and *notify* the owner or person in charge of such property of the *name and address of the driver* and owner of the vehicle involved . . ." (California Vehicle Code, Section 20002(a)). One cannot "notify" another without some type of communication (usually verbal or in writing) and compelled incriminatory communications are precisely what the Fifth Amendment prohibits. *Gilbert v. California*, 388 U.S. 263, 266 (1967); *Schmerber v. California*, 384 U.S. 757, 761, 761 ftn. 5, 763, 763 ftn. 7 (1966), *McCormick, Evidence* (1954) § 134, p. 283.

Likewise, the California Attorney General incorrectly characterizes section 20002(a) as merely requiring a person to identify himself to another. The above quoted language of section 20002(a) demonstrates that what is required is that the *driver* of the offending vehicle must give the name and address *of the driver* of the offending vehicle. Under the facts of the case at bar section 20002(a) required Byers to stop and communicate the name and address of the driver (his name and address) even though, as seen above, this information would furnish a link in the chain of evidence necessary to prosecute him. One need merely envision the trial of Byers upon Count I of the complaint filed in the Justice Court to see how the compelled communication incriminates him. (Count I alleges the violation of section 21750 (failure of the driver to pass to the left at a safe distance).) (A. 7)

---

[7] *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Peoples v. United States*, 365 F.2d 284 (10th Cir. 1966); *Swingle v. United States*, 151 F.2d 512 (10th Cir. 1945).

If Byers had stopped and complied with section 20002(a) he, as the driver of an involved vehicle, would have had to "notify" (communicate to) "the owner or person in charge" of the damaged property of the "name and address" of the *driver* and owner of the involved vehicle. In short, Byers would have had to communicate to that person that "the driver of the vehicle was JONATHAN TODD BYERS, whose address is . . .". If during the trial, a third person had taken the stand and testified that the driver of the vehicle in question was Jonathan Todd Byers, the testimony so given is clearly incriminating for in order to convict Byers under the charge of violation of section 20002(a) as alleged in Count I of the complaint, the prosecutor would have to prove that Byers was the driver. This he would have done by the testimony of the third person. The vice of section 20002(a) is that it actually compels Byers to be a witness against himself, for if Byers had complied with section 20002(a), the prosecutor would simply call the person notified by Byers pursuant to section 20002(a) and have that person testify as to the fact that Byers told ("communicated" to) him that the driver of the vehicle was, "Jonathan Todd Byers whose address is . . ." This "testimony" from the mouth of Byers would have been admissible in the trial as an admission of a party-opponent. See, *e.g., McCormick, Evidence* (1954) § 239 *et seq.*, pp. 502 *et seq.* Even the most conservative view of the Fifth Amendment admits that this is the very vice that the Fifth Amendment was adopted to prevent. See, *e.g.*, VIII *Wigmore, Evidence*, § 2250, pp. 267-295 (McNaughton's rev. 1961); *Levy, Origins of the Fifth Amendment* pp. 324, 330, 427-28, 430 (Oxford University Press, 1968)

C. Compliance with Section 20002(a) Undermines the Values upon Which the Privilege Against Self-Incrimination Rests.

One may accept the argument that compliance with section 20002 does not undercut the values upon which the privilege against self-incrimination rests (Brief for the Petitioner, 18-19), only if the conclusion is first reached that section 20002 does not itself compel self-incrimination.

The values are well and often stated as requiring, in recognition of the inviolability of the human personality, that the government must produce accusatory evidence and not compel it from the mouth of the accused. See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

The quotation from *Miranda*, so often used, and here relied upon by California, (Brief for the Petitioner, 19) itself stresses this point and refutes Petitioner's argument. For it is cases exactly like the one at bar where the underlying values demand that a person must be guaranteed the right to remain silent unless he "chooses to speak in the unfettered exercise of his own will." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

The value is that no man must stand convicted unwillingly out of his own mouth and as well said by Mr. Justice Stewart, the privilege against self incrimination arose from the need for "preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'" *Tehan v. Shott*, 382 U.S. 406, 415 (1966); *Accord, Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55-57 (1964); *Ullmann v. United States*, 350 U.S. 422, 427-28 (1956); *United States v. White*, 322 U.S. 694, 698 (1944); *Bram v. United States*, 168 U.S. 532, 542 (1897); *Boyd v. United States*, 116 U.S. 616, 631-32 (1886); VIII *Wigmore, Evidence* § 2251, p. 317 (McNaughton's rev. 1961); *McKay, Self-Incrimination and The New Privacy*, 1967 Sup. Ct. Rev. 193, 209, 210.

This value lies at the very heart of the American conception of the relationship between a citizen and his government. Any compelled self-incrimination "is contrary to the principles of a free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd v. United States,* 116 U.S. 616, 631-32 (1886).

Thus, the privilege against self-incrimination "prevents the debasement of the citizen which would result from compelling him to 'accuse' himself before the power of the state. The roots of the privilege are deeper than the rack and the screw . . . [t]hey go to the nature of a free man and his relationship to the state." *United States v. Wade,* 388 U.S. 218, 261 (Opinion of Mr. Justice Fortas) (1967).

If California is permitted to compel self-incriminatory evidence from the mouth of Byers by the simple expedient of a statute (Section 20002), it will not only subvert one of the values underlying the Fifth Amendment privilege, but also a value which is fundamental to our conception of the relationship between an American and his government. (See, *Levy, Origins of the Fifth Amendment,* p. 431 (Oxford University Press, 1968))

The argument that the values underlying the Fifth Amendment are not infringed because section 20002(a) requires self-incrimination only "on the spot" is not persuasive. Neither the locale nor the timing of compelled self-incrimination is of any importance. The argument that the information compelled is "so general in nature" relies upon the same misconstruction of section 20002(a) as has appeared elsewhere in the Brief for the Petitioner.

Section 20002(a) does not merely require a person to identify himself, but it requires the driver of the offending vehicle to communicate the name and address of the driver of the vehicle, a very specific piece of evidence which certainly provides the prosecution with a link in the chain of evidence necessary to convict. Under the facts of the case

at bar, since it was a violation of section 21750 (failure of a driver to pass to the left safely) which caused the accident that triggered the application of section 20002(a), if Byers had stopped at the scene and communicated the *name and address of the driver,* he would have been compelled to give evidence from his own mouth which would, at least, provide a link in the chain of evidence necessary to convict him under section 21750.

The arguments set forth in the last half of p. 19 and the first half of p. 20 of the Brief for the Petitioner are answered in the section of this brief below dealing with the restrictions on use imposed by the California Supreme Court.

III. THE CALIFORNIA SUPREME COURT IN ITS DECISION DID NOT EXTEND THE ALBERTSON-MARCHETTI-GROSSO-HAYNES & LEARY CASES, BUT APPLIED THEM TO THE CASE AT BAR.

The law pertaining to the driving of motor vehicles upon the highways of California is an area "permeated with criminal statutes".[8] The appendix lists California penal statutes

---

[8]A partial list of penal statutes regulating the use of California Highways is set forth in the appendix to this brief. The sections were not reproduced because of the expense that would entail.

The suggestion by the Attorney General of California that many of these statutes are not "penal" in nature, but constitute only "infractions" is both unwarranted and inconclusive (see Brief for the Petitioner, p. 22). It is unwarranted because both at the time of Byers' failure to comply with section 20002(a), and at the time he was prosecuted (August 20, 1966 and August 22, 1966, respectively), California Vehicle Code § 40,000 made any violation of the California Vehicle Code a misdemeanor, unless the violation was expressly declared to be a felony or a public offense which is punishable either as a felony or misdemeanor. The concept of "infractions" was introduced into the California Vehicle Code in 1968, which by express provision was to become effective January 1, 1969. See California Stats. 1968 Ch. 1192 § 10.5.

The suggestion is inconclusive for the reason that it is yet undetermined whether "self-incrimination" of an "infraction" violates the Fifth Amendment privilege against self-incrimination.

in effect at the time of the incident here in question. Indeed the area of driving an automobile in California is more "permeated" with criminal statutes than was the area covered by Sections 5841 and 5851 of the National Firearms Act and yet this Court held in *Haynes*, that it was "an area permeated with criminal statutes." *Haynes v. United States*, 390 U.S. 85, 97 ftn. 11, p. 99 (1968). Comparing the statutes on firearms which this Court faced in *Haynes* with the vastly greater numbers of statutes dealing with the driving of motor vehicles, the conclusion is compelled that this is, indeed, "an area permeated with criminal statutes."

Likewise, the argument that section 20002(a) is not directed at persons "inherently suspect of crime" is not well taken. The California Supreme Court in its decision below held,

> ". . . although not all drivers involved in accidents are lawbreakers, there is a substantial correlation between being a driver involved in an accident and being a driver who has contemporaneously violated one or more vehicle laws . . . (A. 64)
>
> Although the group subject to "hit-and-run" statutes [*i.e.*, section 20002(a)][9], drivers involved in accidents, is not inherently suspect of criminal activities to the same extent as the groups regulated by the statutes in *Marchetti*, *Grosso*, and *Haynes*, there is in the accident cases, unlike the situation in *Shapiro*, a substantial shadow of suspicion cast upon the persons regulated by the statute." . . . (A. 64)

Thus the California Supreme Court has held that section 20002(a) is aimed at a "suspect group" inherently suspect of criminal activity (A. 64).

---

[9]Added for the purpose of clarity by counsel.

A. This Court is Bound by the California Supreme Court's Interpretation.

It should be noted that the phrases, "select group" and "inherently suspect of crime" are relative terms requiring the Court to assay the facts and construe the statute in question. Thus in *Haynes v. United States, supra,* 390 U.S. 85 (1968), this Court interpreted the provision of the National Firearms Act there in question and found the operative facts to be such that even though there existed circumstances, termed "uncommon", where registration would not be self-incriminatory, the Court concluded that the statutes there in question were "directed at a highly selective group inherently suspect of criminal activities." *Haynes, supra,* at 96-98.

In reaching this conclusion this Court said, "Nonetheless, the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution." *Haynes, supra,* at 97.

In *Leary v. United States,* 395 U.S. 6 (1969) this Court construed the provision of the federal Marijuana Tax Act. In that case, the Court assayed the factual context in which the act operated, and even though under the provision of the act as so construed the act might not compel self-incrimination because of exceptions in state law making possession of marijuana legal, this Court found that ". . . the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently suspect of criminal activities.' . . ." (*Leary, supra,* at 18). In reaching this finding, this Court said, "It is extremely unlikely that such persons will remain unregistered, for failure to register renders them liable not only to an additional $99 per ounce transfer tax but also to severe criminal penalties." (*Leary, supra,* at 17-18). Since *Albertson, Marchetti, Grosso, Haynes* and *Leary* dealt with self-incrimination under Federal statutes, this Court was at lib-

erty to construe the federal statutes and their relationship with other federal statutes and find the operative facts.

But this is not a federal statute. The California Supreme Court is the final arbiter of "its local laws and the facts on which it founded its judgment are of course controlling here." *General Trading Co. v. State Tax Comm'n.*, 322 U.S. 335, 337 (1944); *Scripto v. Carson*, 362 U.S. 207, 210 (1960); *American Railway Express Company v. Kentucky*, 273 U.S. 269, 272 (1927); *Murdock v. City of Memphis*, 20 Wall. 590, 626, 631, 632-633, 87 U.S. 590 (1875); *Wright, Law of Federal Courts*, § 107, p. 488 (2nd Ed. 1970). The conclusion of the California Supreme Court construing section 20002(a) and its relationship with other California penal statutes and its conclusion concerning the effects of the statute in California fall within the purview of the rules announced in the cases cited immediately above.

B. Even if this Court Is Not Bound by the California Supreme Court's Judgment Below Concerning California State Law, It's Decision Is Persuasive, and It Is Correct.

1. *The Decision of the California Supreme Court Below Is Persuasive*

Even if the decision by the California Supreme Court below concerning the construction of section 20002(a) in relationship with other California penal statutes and the factual orbit in which they revolve is not binding on this Court, that judgment is persuasive. As seen by the above quoted passages from *Haynes* and *Leary* the determination of whether a particular statute is aimed at a "selective group inherently suspect of criminal activities" is a relative determination requiring a court to measure the "likelihood" of self-incrimination (see *Leary v. United States, supra*, 395 U.S. 6, 18 (1969)) or, as in *Haynes*, to measure and weigh the "correlation" between the statutory obligation to di-

vulge information and "violations." *Haynes v. United States, supra,* 390 U.S. 85, 97 (1968). Thus in *Haynes* this Court measured and weighed the correlation and concluded that it was "exceedingly high." (*Haynes v. United States, supra,* at 97). The California Supreme Court is in a much more advantageous position to measure and weigh the correlation between the information required to be divulged by section 20002 and violations of other California State penal statutes. Because of this advantageous position and because of the California Supreme Court's peculiar position to know and measure such matters dealing with the law of California, the California Supreme Court's judgment below that,

> ". . . there is a substantial correlation between being a driver involved in an accident and being a driver who has contemporaneously violated one or more vehicle laws." (A. 64)

is very persuasive.

2. *The Decision of the California Supreme Court Below Is Correct.*

Not only is that judgment persuasive, it is correct. An examination of the vehicle code provisions listed in the appendix to this brief compels the conclusion that it would no doubt be the "uncommon" accident in which one or both of the drivers had not violated one or more of the numerous California vehicle code penal statutes.

Indeed it may be suggested that the California Vehicle Code has been designed to so control the driver and vehicles using California highways so as to avoid accidents, and that the inference is compelling that in the majority of cases where an accident has occurred that it has been caused by a violation of one or more of the sections of the California Vehicle Code.

Under the facts of the case at bar, California Vehicle Code Section 20002(a) operates in an area permeated with criminal statutes and the section is "directed at a highly selective group inherently suspect of criminal activities."

C. Assuming, Solely for the Purposes of this Argument, that Section 20002(a) is Directed at the "Public at Large" and Compels Answers to Questions "Neutral on their Face", Section 20002(a) has Violated Byers' Fifth Amendment Privilege under the Facts of this Case.

Even if this Court can validly find that California Vehicle Code Section 20002(a), contrary to the California Supreme Court's holding below, is directed at the "public at large" and compels answers to questions "neutral on their face", Byers has been compelled to give incriminating evidence from his own mouth thus violating his Fifth Amendment privilege against self-incrimination.

It must be again noted that the California Superior Court, during the course of the prohibition proceedings found that the alleged violation of Vehicle Code Section 21750 (failure of Byers as a driver of a vehicle to pass safely to the left) caused the accident which triggered the application of section 20002(a) (A. 49). Thus criminal conduct on the part of Byers *caused* section 20002(a) to be applicable to him. We have already seen that in order to successfully prosecute Byers under the provision of section 21750, the State of California would have to prove that Byers was driving the vehicle when it failed to pass safely to the left. Since section 20002(a) would have required Byers to stop at the scene and give the name and address of the driver of the vehicle (*one of the very facts that the prosecution must prove to convict Byers*), section 20002(a), under these facts, required Byers to incriminate himself. The hazard of self-incrimination was real and substantial, and not a mere trifling or imaginary hazard. For, as the California Supreme Court said below,

> "In the present case, the Superior Court correctly concluded that at the time of the accident, Byers had reasonable ground to apprehend that if he stopped to identify himself as required by section 20002 of the Vehicle Code he would confront a substantial hazard of self-incrimination. The court had

> before it the fact that Byers was charged with violating section 21750 of the Vehicle Code and the stipulation that the accident giving rise to the obligation under section 20002 resulted from the alleged violation of section 21750." (A. 79)

In addition, the real and substantial nature of the hazard of self-incrimination facing Byers at the time of the accident giving rise to the obligation under section 20002 is demonstrated by the fact that the accident occurred on August 20, 1966 (A. 7, 12, 26) and that the criminal complaint charging Byers with the violation of section 21750 and 20002(a) arising out of the accident in question was filed two days later on August 22, 1966 (A. 7, 12, 26). It is difficult to imagine a case where the hazard of self-incrimination was more substantial and real than when it takes only two days from the criminal act to the commencement of the prosecution.

IV. THE HOLDING OF THE CALIFORNIA SUPREME COURT THAT SECTION 20002(a) VIOLATES THE FIFTH AMENDMENT PRIVILEGE IS ENTIRELY CONSISTENT WITH THIS COURT'S HOLDING IN UNITED STATES v. SULLIVAN.

A. Unlike United States v. Sullivan, 274 U.S. 259 (1927), Every Portion of Section 20002(a) Had the Direct and Unmistakable Consequence of Incriminating Respondent Byers.

It has been noted previously that the California Supreme Court has held that the only purpose of California Vehicle Code section 20002 is to protect property owners from financial loss by requiring drivers involved in accidents resulting in property damage to disclose the name and address of the driver of the offending vehicle (A. 68). *Accord: People v. Stansberry*, 242 Cal. App. 2d 199, 203, 51 Cal. Rptr. 403 (1966); *Miglierini v. Havemann*, 240 Cal. App. 2d 570, 573, 49 Cal. Rptr. 795 (1966).

Consistent with this purpose, section 20002 requires the driver of the offending vehicle to give the name and address of the driver at the scene of the accident.[10]

In order to give the information at the scene, the offending driver must stop at the scene, but the only purpose of requiring the driver to stop is to give the compelled information at the scene. We have already seen that the effect of section 20002(a) was to compel Respondent Byers to give the driver's name and address which in turn compelled Byers to incriminate himself under the charge that he violated section 21750 of the California Vehicle Code which violation caused the collision which produced the property damage that involved the provision of section 20002(a).

Since section 20002(a) has a single purpose and a single requirement (to compel the driver of a vehicle to give the name and address of the driver to the owner or person in charge of the damaged property at the scene, for the purposes of protecting the owner against financial loss incurred as a result of the damage) ". . . [u]nlike the income tax return in question in *United States v. Sullivan*, 274 U.S. 259 (1927), every portion of . . ." section 20002(a) ". . . had the direct and unmistakable consequence of incriminating . . ." Respondent Byers. *Marchetti v. United States, supra*, 390 U.S. 39, 48-49 (1968).

The case at bar is completely distinguishable from *Sullivan* in that "every portion" (*albeit*, section 20002(a) has essentially only *one* "portion") of section 20002 is self-incriminating whereas most, if not all, of the Federal Income Tax law is not self-incriminating. In this regard section 20002 is like the federal wagering tax act involved in *Marchetti* and *Grosso*, and is unlike the federal income tax provisions upheld in *Sullivan*.

---

[10]A more detailed statement is required if the driver does not locate and notify the owner or person in charge of the damaged property. § 20002(a)(2).

B. The Case at Bar Is Entirely Consistent with United States v. Sullivan, 274 U.S. 259 (1927).

Not only is the case at bar distinguishable from *Sullivan*, but it is also consistent with the suggestion made by this Court in *Sullivan* that if the Federal income tax return required self-incrimination, that the privilege could be claimed in the return to the specific self-incriminating disclosure required by the return. *United States v. Sullivan, supra,* 274 U.S. 259, 263 (1927). Since not every portion of the federal income tax return compelled self-incrimination, Sullivan was not privileged to fail to make a return. *United States v. Sullivan, supra* at 263-264. Whereas, Marchetti was privileged to fail to pay the occupational tax and to fail to register under the federal wagering tax act because ". . . [e]very element of these requirements would have served to incriminate petitioner; to have required him to present his claim to Treasury officers would have obliged him to 'prove guilt to avoid admitting it.'" *Marchetti v. United States, supra,* 390 U.S. 39, 50 (1968).

In this respect, *Sullivan, Marchetti,* and the case at bar are consistent with each other. Since section 20002(a) only requires the driver to give the name and address of the driver at the scene and since under the facts of this case that compelled information was self-incriminating, Respondent Byers was privileged from making the disclosure, under the assumption of absence of use restrictions.

Since the only purpose of the statute was to compel the forbidden disclosure, and since the Fifth Amendment privilege against self-incrimination constitutes a complete defense to the disclosure, the Fifth Amendment privilege would be a complete defense to a prosecution under section 20002 under the facts of this case. Just as Marchetti was privileged to fail to register and pay the occupational tax, Byers was privileged not to make the incriminating disclosure at the scene of the accident as required by section 20002 (a). Just as Sullivan would have been privileged to fail to answer specific incriminating questions contained in

the return, so Byers was privileged not to incriminate himself when required to do so. The crucial difference here between *Sullivan* and the case at bar is that not all of the information required from Sullivan was self-incriminating whereas all of the information compelled from Byers was self-incriminating.[11]

---

[11] In footnote 8 of the Brief for the Petitioner (p. 23) several cases are cited in further support of the Petitioner's argument. These cases are all distinguishable from the case at bar. *Warszower v. United States*, 312 U.S. 342 (1941) did not involve a Fifth Amendment claim. *United States v. Walden*, 411 F.2d 1109 (4th Cir. 1969, cert. den. 396 U.S. 931 (1969)) did not involve the situation in which all the defendant could do was to incriminate himself. The defendant could have simply not have operated the distillery. In this regard, *Walden* is like *Minor v. United States*, 396 U.S. 87 (1969) rather than the case at bar. *People v. Mendoza*, 251 Cal. App. 2d 835, 60 Cal. Rptr. 5 (1967) is a simple identification case. It should be noted that there was no statute applicable in *Mendoza* that required the owner or possessor of the .25 caliber automatic pistol there in question, which was concealed in the glove compartment of the car, to give to the police or border guards the name and address of the owner or possessor of the concealed weapon. Also, there was no causative link between the ownership or possession of the concealed weapon and the requirement to identify himself. The requirement of identification came as a result of Mendoza's crossing the international border from Mexico into California. It was only during a customs search that the concealed pistol was found by the custom authorities. *United States v. Olson*, 253 Fed. 233 (W. D. Wash. 1917) did not involve self-incrimination by compelled *compliance* with a penal statute. Defendant there did not register for the draft and consequently did not obtain a draft registration certificate. When he was asked to exhibit his registration certificate as apparently required by the statute, he could not comply. This is a completely distinguishable situation from the situation at bar for in the case at bar. Respondent Byers had to chose between self-incrimination or violating section 20002. In *Olson*, the criminal failure to register resulted in his failure to have a registration certificate and is not meaningfully separated from the original offense.

V. THE CASE AT BAR DOES NOT COME WITHIN THE PURVIEW OF THE "REQUIRED RECORDS DOCTRINE" OF SHAPIRO v. UNITED STATES.

The case at bar does not come within the purview of the "required records doctrine" of *Shapiro v. United States,* 335 U.S. 1 (1948). There are three principal requirements of the "required records doctrine": First, the statute must require the citizen to keep and preserve records of the same kind as he has customarily kept; second, there must be a "public aspect" to the records required to be kept, and third, the requirements must be imposed in an essentially non-criminal and regulatory area of inquiry as in *Shapiro* as opposed to being directed to a "selective group inherently suspect of criminal activities." *Marchetti v. United States, supra,* 390 U.S. 39, 57 (1968); *Grosso v. United States, supra,* 390 U.S. 62, 68-69 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 98-99 (1968); *Leary v. United States, supra,* 395 U.S. 6, 13 (1969)

Each of the three principal elements of the doctrine, as it is described in *Shapiro,* is absent from this situation.

First, Respondent Byers was not, by the provisions of California Vehicle Code section 20002, required to keep and preserve records of the same kind as he has customarily kept. Indeed, the required information, the name and address of the driver and owner of the offending vehicle, which was *his* name and address, is totally unrelated to any record keeping system that Byers might have. Section 20002(a), rather than requiring record keeping of any kind, simply required Byers to provide testimony which resulted in self-incrimination. See *Marchetti v. United States, supra,* 390 U.S. 39, 57 (1968); *McKay, Self-Incrimination and The New Privacy,* 1967 *Sup. Ct. Rev.* 193, 221.

Secondly, there is no "public aspect" to the information required to be given under the compulsion of section 20002(a). As seen before, the sole purpose of the information is to protect owners of private property from financial loss as a result of property damage by some unknown per-

son. It is difficult to imagine a case in which a state statute seeks information for a more limited purpose than the protection of the property rights of a single person against infringement by another single citizen. Section 20002 thus has almost purely "private aspects" rather than "public aspects." The fact that the state requires the information by statute does not justify the conclusion that the information has sufficient "public aspects" to come within the "required records doctrine". In *Marchetti*, this Court said:

> "The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress." *Marchetti v. United States*, 390 U.S. 39, 57 (1968).

Last, for the reasons set forth above,[12] section 20002 is, unlike the statute in *Shapiro*, directed at a "selective group inherently suspect of criminal activities" and therefore again distinguishable from *Shapiro*.

Thus, for the same reasons set forth by this Court in *Marchetti*, *Grosso*, *Haynes* and *Leary*, the "required records doctrine" of *Shapiro* is not applicable to the case at bar.

---

[12]See p. 31 to 35, *supra*, of this brief for a full discussion.

VI. THE CREATION OF USE RESTRICTIONS STRUCK AN APPROPRIATE BALANCE BETWEEN THE INTERESTS OF THE STATE AND THE INTERESTS OF RESPONDENT BYERS.

A. This Court Has Never Used a Balancing Formula to Determine Whether the Fifth Amendment Has Been Abridged in a Given Case.

In section IV of the Brief for the Petitioner, the assumption is made, solely for the purposes of argument, that the privilege against self-incrimination does apply to the facts of the case at bar, but it is nevertheless argued that the compelling state interest should be weighed in favor of disclosure (p. 24), thus compelling self-incrimination.

No case is cited by the Attorney General of California which indicates that this Court has ever been willing to approach the Fifth Amendment privilege against self-incrimination in this manner. No weighing or balancing test has ever been used in applying the Fifth Amendment by this Court in any case that we could find. Once it is found that the privilege against self-incrimination does apply the prohibition against violation of the privilege by compelling self-incrimination is *absolute.*

The reason why this Court has never approached the Fifth Amendment other than with the concept of absolute prohibition appears to be twofold: First, the language of the Fifth Amendment itself admits of no other plausible and reasonable interpretation;[13] and, second, it is precisely in the area where the state's interest in a full disclosure is the *most* compelling, that the amendment has its most vital meaning. The argument presented by the Attorney General of California would logically result in the ultimate demise of the Fifth Amendment as a meaningful right of all Ameri-

[13] "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." *United States Constitution, Amendment Five.*

cans, for it would only be invoked to prevent disclosure in cases where the state's interest is not "compelling". So construed, we might as well not have a Fifth Amendment. It is not surprising then that the Attorney General of California cites no authority relevant to his argument, for such a dialectic approach has never been used by this Court in determining whether the Fifth Amendment prohibition has been violated, once it is found that the Fifth Amendment is applicable to the disclosure in question.

United States v. O'Brien, 391 U.S. 367 (1968) is not in point. O'Brien was a First Amendment and not a Fifth Amendment case. This distinction is crucial.

> "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

Thus in applying the First Amendment this Court has used a balancing formula to determine whether the particular official action has abridged free speech and therefore violated the First Amendment (*see, e.g., Schenck v. United States*, 249 U.S. 47, 52 (1919) (concurring opinion of Mr. Justice Holmes); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Dennis v. United States*, 341 U.S. 494 (1951); *Pickering v. Board of Education*, 391 U.S. 563 (1968)). *O'Brien* presents a "typical" example of this Court's application of the balancing formula in First Amendment cases. The balancing formula has no application to cases involving the Fifth Amendment.

B. The State Interest Involved with Section 20002 is the Protection of Property Owners Against Financial Loss and Is Not "Driver Regulation" and "Highway Safety."

It must be constantly borne in mind that the only purpose of section 20002 of the California Vehicle Code is to protect the owners of private property against financial loss. The Attorney General of California recognizes this as the sole purpose of section 20002 but persistently confuses the "compelling" state interest with other interests not protected by section 20002. Section 20002 has nothing to do with the protection of the interests of "drivers and pedestrians alike in an effort to assure highway safety" (Brief for the Petitioner, p. 24) except insofar as it protects them from financial loss because of damage to their property. Thus, the "compelling" state interest involved in section 20002, and here in issue is not "driver regulation" and "highway safety", but the protection of property owners against financial loss.

C. The California Supreme Court Created Use Restrictions in Order to Recognize the State Interest in Protecting Private Property from Financial Loss and Protect Respondent's Fifth Amendment Privilege Against Self-Incrimination.

The California Supreme Court held that section 20002(a), without more, violated Respondent Byers' Fifth Amendment privilege against self-incrimination under the facts of this case (A. 66), but in order to make the information available for the protection of private property, the California Supreme Court judicially created use restrictions (A. 70), saying:

> "Although the privilege against self-incrimination was applicable, the privilege does not furnish a defense to a charge of violation of section 20002 because the purpose of the privilege is satisfied by the rule we adopt today that prosecuting authorities are

precluded from using information divulged in compliance with section 20002 and the fruits of such information in circumstances where the driver would otherwise be constitutionally privileged not to comply." (A. 79)

Having first found that, without more, section 20002(a) abridged Byers' Fifth Amendment privilege against self-incrimination, the California Supreme Court could only hold either that the Fifth Amendment constituted a complete defense or create restrictions on the use of the information sufficient to protect Respondent Byers' privilege against self-incrimination. As a matter of Federal Constitutional law, no other choice was available to the California Supreme Court once the conclusion was reached that section 20002(a) abridged Byers' Fifth Amendment privilege. *See, e.g., Murphy v. Waterfront Commission, supra,* 378 U.S. 52, 79 (1964); *Albertson v. SACB, supra,* 382 U.S. 70, 79-81 (1965); *Marchetti v. United States, supra,* 390 U.S. 39, 60 (1968); *Grosso v. United States, supra,* 390 U.S. 62, 69-70 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 100 (1968); *Leary v. United States, supra,* 395 U.S. 6, 13 (1969); *Gardner v. Broderick,* 392 U.S. 273, 276 (1968).

Once it is found that the Fifth Amendment privilege has been abridged by a statute, the only way in which the information *may* be compelled is by the imposition of restrictions upon the use of the information so received which must afford "'. . . complete protection from all the perils against which the constitutional prohibition was designed to guard . . .'." *Albertson v. SACB, supra,* 382 U.S. 70, 80 (1965). The constitutional inquiry begins with the determination that the statute in question abridges the Fifth Amendment privilege against self-incrimination and ends with an assessment of the use restrictions imposed for the purposes of determining whether they are adequate to afford "complete protection from all the perils against which the constitutional prohibition was designed to guard."

This portion of the argument assumes that it has been correctly determined that section 20002(a) violates Respondent Byers' Fifth Amendment privilege against self-incrimination. (See, Brief of the Petitioner, p. 24). The only remaining constitutional inquiry is whether the use restrictions imposed by the California Supreme Court adequately protect Respondent Byers from self-incrimination. Since the use restrictions imposed by the California Supreme Court preclude prosecuting authorities from using information divulged in compliance with section 20002 together with the "fruits" of such information, we concede that the use restrictions adequately protect Respondent Byers' Fifth Amendment privilege against self-incrimination. The touchstone of validity of use restrictions in the Respondent Byers' Fifth Amendment privilege, and since he concedes it to be adequately protected by the use restrictions judicially created by the California Supreme Court below, this should end the inquiry under the assumptions of this argument.

The Attorney General of California argues that the use restrictions imposed by the California Supreme Court below make the state's ability to enforce its criminal laws difficult, if not impossible (Brief for the Petitioner, p. 25).

The constitutional validity of use restrictions is determined by whether or not they adequately protect Respondent Byers' Fifth Amendment privilege. If use restrictions do not adequately protect the citizen from self-incrimination, then the only choice is to find that the Fifth Amendment constitutes a complete defense to a criminal prosecution under the statute which compels the information. *Albertson v. SACB, supra,* 382 U.S. 70, 79-81 (1965). See also, *Marchetti v. United States, supra,* 390 U.S. 39, 58-60 (1968); *Grosso v. United States, supra,* 390 U.S. 62, 69-70 (1968); *Haynes v. United States, supra,* 390 U.S. 85, 99-100 (1968); *Leary v. United States, supra,* 395 U.S. 6, 13 (1969).

Once it is concluded that a statute violates a citizen's Fifth Amendment privilege, the particular court must find either that the Fifth Amendment constitutes a complete de-

fense to a prosecution under the statute for failure to divulge the required information or create use restrictions adequate to protect the citizen's Fifth Amendment privilege. The only Federal Constitutional aspects of the problem are the initial determination as to whether the statute violates the Fifth Amendment privilege and, whether the use restrictions if any have been created, are adequate to protect the Fifth Amendment privilege.

The decision to impose use restrictions rather than to hold the Fifth Amendment to be a complete defense, once the Court has found that the statute violates the Fifth Amendment privilege, is a matter of *state law* and not federal constitutional law.

The decision as to which of these two constitutionally adequate alternatives would be used in this case was a matter of the law of the State of California and is not reviewable by this Court. The determination of this issue revolves around the intent of the California Legislature in enacting section 20002 (A. 75-76) and assessing the impact of use restrictions in California upon criminal prosecution of drivers involved in accidents resulting in damage to the property of others (A. 75), both of which are issues in which the Supreme Court of California is the final arbiter.

The California Supreme Court held that use restrictions would not unduly hamper criminal prosecutions in California (A. 75) and that the creation of use restrictions comported with the probable legislative intent of the California Legislature (A. 77).

The Brief for the Petitioner, insofar as it argues that the creation of the use restrictions "made the state's ability to enforce its criminal laws difficult, if not impossible" (Brief for the Petitioner, pp. 24-25) presents no constitutional argument to this Court.

Since the decision by the California Supreme Court to impose adequate use restrictions, rather than to recognize the Fifth Amendment as a complete defense, constitutes a

decision concerning state law only and since the Attorney General of California does not argue that the use restrictions imposed do not adequately protect Byers' Fifth Amendment privilege, no Constitutional attack on the use restrictions actually adopted by the California Supreme Court below has been urged.

It is conceivable that a state might propound a Constitutional argument against over-broad use restrictions (assuming first that the statute in question violates the Fifth Amendment privilege and that the state Supreme Court elected to use the restriction on use device). If the use restrictions imposed exceeded what was necessary to adequately protect the Fifth Amendment privileges of the citizen involved they might be subject to attack, but we do not read the Brief for the Petitioner as propounding such an argument. Quite apparently, the use restrictions imposed in this case are not overbroad for they merely precluded ". . . prosecuting authorities . . . from using information divulged in compliance with section 20002 and the fruits of such information in circumstances when the driver would otherwise be constitutionally privileged not to comply." (A. 79)

The suggestion that these use restrictions "immunizes . . . the fact that he has stopped and the fruits of that stopping" (Brief for the Petitioner, p. 25) may be termed "fanciful" for they have no relationship either to the facts or the use restrictions imposed in this case. The use restrictions concern *using* information divulged in compliance with section 20002 and the fruits of such information. The fact that a person has stopped is neither within the purview of the use restriction, nor the Fifth Amendment. See, *Bailey v. Superior* Court, 4 Cal. App. 3d 513, 84 Cal. Rptr. 436, 440-441 (1970).

VII. REGARDLESS OF THE CONCLUSION REACHED BY THIS COURT ON THE CONSTITUTIONAL ISSUES TENDERED, THE UNIQUE DISPOSITION OF THIS CASE BY THE CALIFORNIA SUPREME COURT ON STATE GROUNDS REQUIRES THIS COURT TO AFFIRM THE JUDGMENT BELOW.

The case before the California Supreme Court below was an appeal by the People from a judgment granting Respondent Byers' petition for a writ of prohibition which judgment prohibited the state from prosecuting Byers under California Vehicle Code Section 20002(a) upon the theory that section 20002(a) violated Byers' Fifth Amendment privilege against self-incrimination. (A. 57, 59, 79-80)

The California Supreme Court held (1) that without consideration of the imposition of use restrictions, section 20002(a) did violate Respondent Byers' Fifth Amendment privilege, but (2) since the California Supreme Court, for the first time in the judicial history of California, judicially created use restrictions which adequately protected Respondent Byers' Fifth Amendment privilege, that Respondent Byers was required to comply with the provision of section 20002(a). (A. 79-81)

A Court more taken with classical theory than with the realities of the world would have reversed the judgment, for classical theory would have found that although the use restrictions were judicially created for the first time in this very appeal, the Court merely "discovered" existing law that existed at the time Byers refused to comply with section 20002 and therefore he was incorrect and could have been punished for his failure to comply.

The California Supreme Court, recognizing that ". . . we here announce a doctrine new to this state's jurisprudence . . ." (A. 80) *affirmed* the judgment saying ". . . it would be unfair to hold that although Byers correctly asserted that the Fifth Amendment privilege was applicable to the question of his compliance with the "hit-and-run" statute he should have complied because of use-restrictions which he could only have speculated might exist." (A. 81-82)

If this Court holds that the California Supreme Court is incorrect in its holding that section 20002(a) violates Respondent Byers' Fifth Amendment privilege, *a fortiori* Byers cannot, with "fairness" be punished for having "correctly asserted", according to all of the justices of the state Supreme Court, that the Fifth Amendment privilege was applicable. Since all of the justices of the state's highest court agreed with Byers that the Fifth Amendment privilege was applicable to the question of his compliance with section 20002, at most he is guilty of bad constitutional jurisprudence, but not of crime. Fairness demands no less than affirmance.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the California Supreme Court below should be affirmed.

Dated: Davis, California
August 12, 1970

John W. Poulos
Counsel for Respondent

Appendix

UNITED STATES CONSTITUTION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA VEHICLE CODE

§ 16000. Report required. The driver of every motor vehicle which is in any manner involved in an accident originating from the operation of a motor vehicle on any street or highway which accident has resulted in damage to the property of any one person in excess of one hundred dollars ($100) or in bodily injury or in the death of any person shall within 15 days after the accident, report the accident on a form approved by the department to the office of the department at Sacramento, subject to the provisions in this article. (Stats.1959, c. 3, p. 1635, § 16000.)

§ 20001. Death or personal injuries. The driver of any vehicle involved in an accident resulting in injury to any person, other than himself, or death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004, and any person failing to stop or to comply with the requirements under such circumstances is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not to exceed one year or by fine of not to exceed five thousand dollars ($5,000) or by both. (Stats.1959, c. 3, p. 1661, § 20001.)

§ 20002. (a) The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either:

(1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or;

(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

Any person failing to stop or comply with said requirements is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both. (Stats.1965, ch. 872, § 3)

§ 20003. Duty upon injury or death. The driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his name, address, the registration number of the vehicle he is driving, the name of the owner, and upon request and if available exhibit his driver's license to the person struck or the driver or occupants of any vehicle collided with or shall give such information and exhibit his license to any traffic or police officer at the scene of the accident and shall render to any person injured in the accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if such carrying is requested by the injured person. (Stats.1959, c. 3, p. 1661, § 20003.)

§ 20004. Duty upon death. In the event of death of any person resulting from an accident, the driver of any vehicle involved after fulfilling the requirements of this division, and if there be no traffic or police officer at the scene of the accident to whom to give the information required by Section 20003, shall, without delay, report the accident to the nearest office of the Department of the California Highway Patrol or office of a duly authorized police authority and submit with the report the information required by Section 20003. (Stats. 1959, c. 3, p. 1661, § 20004.)

§ 20005. Duty upon damage to property. The driver of any vehicle involved in an accident resulting in damage to property shall take reasonable steps to locate and notify the owner or person in charge of the property of the damage, his name and address, and the registration number of the vehicle he is driving, and shall upon request and if available exhibit his driver's license, except that when the driver of any vehicle collides with any vehicle which is unattended the provisions of Section 20007 shall apply. (Stats. 1959, c. 3, p. 1662, § 20005.)

§ 21750. Overtake and Pass to left. The driver of a vehicle overtaking another vehicle proceeding the same direction

shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated.

Amended Ch. 577, Stats. 1961. Effective Sept. 15, 1961.

§ 40000. Misdemeanors. It is unlawful and constitutes a misdemeanor for any person to violate, or to fail to comply with, any provision of this code, unless the violation is under the provisions of this code expressly declared to be a felony or a public offense which is punishable either as a felony or misdemeanor. Stats. 1959 ch. 3

The following is a partial list of California Vehicle Code sections dealing with the operation of motor vehicles upon the highways of the State of California, including registration requirements, equipment requirements, and the rules of the road.

4000	13202	21052	21658
4851	13350	21113	21659
5200	13352	21450	21660
5201	13355	21451	21661
5202	14601	21452	21662
5204	16000	21453	21663
10501	16001	21454	21664
10750	16002	21457	21700
10751	16003	21458	21701
10851	16004	21460	21702
10853	16020	21460.5	21703
11511	16022	21461	21704
12500	16080	21462	21705
12511	16100	21650	21706
12515	20001	21651	21707
12516	20002	21652	21708
12517	20003	21653	21709
12519	20004	21654	21710
12950	20006	21655	21711
12952	20008	21656	21712
13201	20009	21657	21750

21751	22355	23343	25250
21752	22356	24001	25251
21753	22358.5	24002	25268
21754	22362	24003	25269
21755	22363	24004	25400
21756	22400	24250	25951
21757	22405	24251	25952
21758	22409	24252	25953
21759	22410	24400	26311
21800	22450	24401	26450
21801	22451	24402	26451
21802	22452	24403	26452
21803	22500	24404	26453
21804	22504	24405	26454
21805	22505	24406	26455
21806	22510	24407	26456
21807	22514	24408	26457
21950	22515	24409	26502
21951	22516	24410	26503
21952	22517	24600	26504
21954	22520	24601	26505
22100	22700	24603	26506
22101	23100	24604	26507
22102	23101	24606	26508
22103	23102	24607	26520
22104	23103	24800	26521
22105	23108	24950	26522
22106	23109	24951	26700
22107	23110	24952	26703
22108	23111	24953	26706
22109	23112	25101	26707
22110	23114	25102	26708
22111	23120	25103	26709
22113	23121	25104	27153
22349	23122	25105	27154
22350	23123	25106	27155
22351	23123.5	25107	27156
22352	23333	25108	27450
22354	23341	25109	27451

27452
27453
27454
27459
27460
27461
27600
27602
40000
40001
40002
40003
40004
40005
40300
40301
40302
40303
40304
40305
40306
40307
40309
40311
45000
40508
40512
41100
41102